

MAR 30 1977

MICHAEL RODAK, JR., CLERK

---

# Supreme Court of the United States

---

October Term, 1976

No. 76-496

---

BENSON A. WOLMAN, *et al.*,  
*Appellants,*

vs.

MARTIN W. ESSEX, *et al.*,  
*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO

---

## BRIEF OF 21 OHIO INDEPENDENT SCHOOLS, AMICI CURIAE

---

THOMAS A. QUINTRELL

THOMAS V. CHEMA

1144 Union Commerce Building

Cleveland, Ohio 44115

(216) 696-1144

*Attorneys for 21 Ohio  
Independent Schools,  
Amici Curiae*

*Of Counsel:*

ARTER & HADDEN

1144 Union Commerce Building

Cleveland, Ohio 44115

(216) 696-1144

---

# Supreme Court of the United States

---

October Term, 1976

No. 76-496

---

BENSON A. WOLMAN, *et al.*,  
*Appellants,*

vs.

MARTIN W. ESSEX, *et al.*,  
*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO

---

BRIEF OF 21 OHIO INDEPENDENT SCHOOLS,  
AMICI CURIAE

---

## INTEREST OF THE AMICI CURIAE

This Brief is submitted with the consent of counsel on behalf of the 21 Ohio independent, non-sectarian, non-profit schools listed in the Appendix hereto. All of these schools are engaged in primary and/or secondary education in the State of Ohio with a total enrollment of over 8,000 students who benefit from the provision of Ohio Revised Code Sec. 3317.06. All but three of the schools are members of the Ohio Association of Independent Schools and all are qualified as exempt organizations under Sec. 501(c)(3) of the Internal Revenue Code. The aid provided during the current biennium has been expended for stu-

dents in these independent schools principally on textbooks and auxiliary materials and equipment, relatively small amounts on medical and diagnostic services and very little on remedial services.

As applied to these non-sectarian schools, there should be no question as to the validity of the Ohio statute under the First and Fourteenth Amendments of the United States Constitution.

These independent schools file this Brief because of the importance of preserving an alternative to our public education system and of recognizing the right of the individual to have a viable alternative. It would be unfortunate if children are denied basic educational material as well as health and medical assistance merely because they attend non-public schools.

### **I. The Furnishing of Textbooks and Instructional Materials and Equipment Are Not Violative of the Establishment Clause.**

The appellants in this case concede that the validity of loaning textbooks to children or parents of children in non-public schools has been properly laid to rest in *Board of Education v. Allen*, 392 U.S. 236 (1968) and in *Meek v. Pittenger*, 421 U.S. 349 (1975).

Like the dissenters in *Meek*, these amici find it "difficult to articulate any principal basis upon which to distinguish the textbook provision"<sup>1</sup> from the material and equipment provisions of the Ohio statute which permits the use of instructional materials and equipment only if they are "incapable of diversion to religious use." For the independent non-sectarian school, the instructional material and equipment cannot be diverted to religious use.

<sup>1</sup> *Meek v. Pittenger*, 421 U.S. 349, 391 (1975), (opinion of Rehnquist, J.).

This limitation plus the fact that they are loaned to students or parents overcome the objections set forth in the *Meek* case. In this day and age of modern electronic technology, can there be a valid constitutional distinction between a mathematics textbook and a calculator or between a foreign language textbook and a language tape? The three-judge District Court in this case said that it was

"... unable to determine a substantive difference between textbooks on the one hand and maps, charts, models and collections on the other, except, possibly, the relative effectiveness of the latter in attracting the attention of a particular student and in educating him. In the view of this Court, however, the determination of pedagogical effectiveness is better left to educators than to the courts."<sup>2</sup>

### **II. The Auxiliary Services Are Justified as General Welfare Services Which Do Not Offend the Establishment Clause.**

The auxiliary services, contemplated by the Ohio statute, are not integral to classroom education as such, but rather pertain to the general physical, mental and emotional fitness of each child. They are at the very most auxiliary and supplemental to the educational mission of the schools. The Ohio Legislature has chosen to provide these services to all students in the State and has selected the schools as the best means of reaching every young person.<sup>3</sup>

This Court has made it clear that a government may not deny a benefit, even a gratuitous one, to a person or class of persons on a basis that infringes his constitution-

<sup>2</sup> *Wolman v. Essex*, 417 F. Supp. 1113, 1119 (S. D. Ohio 1976).

<sup>3</sup> The Court in *Meek v. Pittenger*, 421 U.S. 349, 360, n.8, found the fact that the services for public school students are codified in one statute and the same services for non-public school students are codified in a second statute "is of no constitutional significance."



ally protected interests, including First Amendment interests. *Speiser v. Randall*, 357 U.S. 513 (1958). As the Court said in *Sherbert v. Verner*, 374 U.S. 398 (1963):

"This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation.'"

More recently, this Court, in *Meek* reaffirmed "the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools."<sup>4</sup> Nevertheless, in *Meek* the Court struck down certain auxiliary services authorized by the Legislature on the ground that excessive entanglement would be required for the State to assure that the professional staff members providing such services do not advance the religious mission of the non-profit schools.

The Ohio Legislature, mindful of the errors found in *Meek*, drafted Section 3317.06 in order to avoid such entanglements. The legislation distinguishes diagnostic and health services from treatment services. Only the former are provided on the non-public school premises; the latter are provided only in public places.

This distinction is significant because it assures that there will not be public identification of the State with the religious purposes of the parochial schools. The so-called "auxiliary services" provided in Section 3317.06 are public welfare aid to individuals, which aid has sectarian content only when sectarian schools are vehicles for its distribution. The Court has never held such State aid to be

<sup>4</sup> 421 U.S. 349, 368, n.17.

impermissible. Indeed, *Everson*<sup>5</sup> and *Allen*<sup>6</sup> stand for the contrary.

### III. The Constitution Does Not Permit Discrimination Against Non-Public Education.

Non-public education, embracing as it does a wide spectrum of sectarian and non-sectarian schools, is a vital part of our national educational establishment. It is well to remember that when the First Amendment was adopted, there were no public school systems in the United States.<sup>7</sup> In fact, the public schools as we know them today were an outgrowth of the private school model. Consequently, it can hardly be held that the Founding Fathers intended the establishment clause to serve as a vehicle for the abolition of private schools, sectarian or otherwise.

It is generally acknowledged that the great strength of American education is its diversity. The non-public schools are of inestimable value because of the alternative options which they provide. Within the private sector itself, there is further diversity, as exemplified in the totally non-sectarian purposes of the schools represented in this brief, whose small institutional size and special purpose functions allow unique opportunities for academic excellence and responsible innovation.

If this Court should find that the Ohio statute in question has the indirect effect of aiding church-related schools by providing material and services to children, there is sufficient constitutional reason to permit this tangential aid. The schools are not mere conduits to the churches which stand behind them. Rather, the schools are impor-

<sup>5</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>6</sup> *Board of Education v. Allen*, 392 U.S. 236 (1968).

<sup>7</sup> CORNELISON, *THE RELATION OF RELIGION TO CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA*, (1895).

tant segments of the community at large.<sup>8</sup> The need for pluralism in our society is a "competing interest" which must be weighed in the balance.

In striking the balance, these *amici* urge the Court to be mindful of the words of Mr. Justice Blackmun that:

"A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required."<sup>9</sup>

<sup>8</sup> *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930); *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>9</sup> *Roemer v. Maryland Public Works Board*, \_\_\_\_ U.S. \_\_\_\_, 49 L. Ed. 2d 179, 187 (1976) (Footnote omitted).

## CONCLUSION

The Ohio legislation has been carefully drawn to meet the guidelines set out by this Court. The purpose and effect of the statute is to aid children, not religion. The prohibited entanglements are not present. Any "indirect and incidental" benefit which the statute may afford sectarian schools should not defeat its constitutional validity.

For these reasons, and for the reasons developed by the Appellees in their briefs, these *amici* respectfully urge this Court to affirm the judgment of the District Court.

Respectfully submitted,

THOMAS A. QUINTRELL

THOMAS V. CHEMA

ARTER & HADDEN

1144 Union Commerce Building

Cleveland, Ohio 44115

(216) 696-1144

*Attorneys for 21 Ohio  
Independent Schools,  
Amici Curiae*

March 28, 1977

**APPENDIX**

| <b>School</b>                             | <b>Head</b>              |
|---|--------------------------|
| Andrews School, Willoughby                | Roberta M. Lee           |
| Canton Country Day School, Canton         | Thomas W. Keeley         |
| Center City School, Dayton                | Robert Hoover            |
| Cincinnati Country Day School, Cincinnati | Charles F. Yeiser        |
| The Columbus Academy, Columbus            | William S. Putnam        |
| Columbus School for Girls, Columbus       | John V. Chapman          |
| The Grand River Academy, Austinburg       | Keith A. Johnson         |
| Hathaway Brown School, Cleveland          | Bancroft F. Greene       |
| Hawken School, Cleveland                  | T. Douglas Stenberg      |
| Lake Ridge Academy, North Ridgeville      | Clay Noia                |
| Laurel School, Cleveland                  | Daniel O.S. Jennings     |
| Maumee Valley Country Day School, Toledo  | Jerry C. Millhon         |
| Metropolitan School, Columbus             | F. James Donnellan       |
| The Miami Valley School, Dayton           | Robert E. Fatherley, Jr. |
| Old Trail School, Bath                    | Wilfred J. Hemmer        |
| Phillips School of Lake Erie, Painesville | Margaret Bowers          |
| Ridgewood School, Springfield             | Herbert E. Distelhorst   |
| The Seven Hills Schools, Cincinnati       | Henry P. Briggs, Jr.     |
| Sixpence School of Columbus, Columbus     | Marvin E. Baker          |
| University School, Cleveland              | Rowland P. McKinley, Jr. |
| Western Reserve Academy, Hudson           | Hunter M. Temple         |